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Fitting Principles within a Positivistic Model of Law

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I. INTRODUCTION

Positivism and in particular the views of H.L.A. Hart[1] have come under serious criticism from several authors, the most notable of these being Ronald Dworkin,[2] Graham Hughes[3] and Samuel Shuman.[4] Their objections to Hart's model focus on the fact that judicial decision-making in the United States cannot be explained and predicted by a jurisprudential model that includes only rules and separates out principles and policies.

That rules are the basic fabric of our law is not to be denied.[5] Statutory law attests to the validity of this proposition. But to end analysis there, is to leave unexplained and unexplainable a sizable percentage of judicial opinions. For example, Dworkin[6] argues that judges often are faced with a case where a rule does not exist to dictate their decision. It is only after they reach their decision that the rule springs into existence. Therefore, "the court

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1. H. HART, THE CONCEPT OF LAW (1961) [hereinafter cited as HART].
2. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter cited as *Model of Rules*].
3. Hughes, *Rules, Policy and Decision Making*, 77 YALE L.J. 411 (1968) [hereinafter cited as Hughes].
4. Shuman, *Justification of Judicial Decisions*, 59 CALIF. L. REV. 715 (1971) [hereinafter cited as Shuman].
5. Dworkin does deny this. *See* Dworkin articles, *supra* note 2. *But see* Christie, *The Model of Principles*, 1968 DUKE L.J. 649 (1968); Gross, *Jurisprudence*, in 1968/1969 ANNUAL SURVEY OF AM. L. 575; Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972); Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHIL. Q. 151 (1971); Tapper, *A Note On Principles*, 1971 MODERN L. REV. 628 (1971).
6. *Model of Rules, supra* note 2.

cites principles as its justification for adopting and applying a new rule."[7] Dworkin cites *Riggs v. Palmer*[8] and *Henningsen v. Bloomfield, Inc.*[9] as representive of the class of decisions in which principles are used.

In *Riggs*, a beneficiary murdered the testator in order to prevent him from revoking the beneficiary's interest in the will. The sole question before the court was whether or not the murderer could take his interest under the will. As the court noted:

> It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give the property to the murderer.[10]

The court disallowed the devise by reasoning that all laws may be controlled by fundamental principles such as "no one shall be permitted to profit by his own fraud or to take advantage of his own wrong . . . or to acquire property by his own crime."[11] The court acknowledged that this principle was the basis of the rule it was about to create.

> Under the Civil Law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered.[12]

In *Henningsen*, Mr. Henningsen purchased an automobile for his wife. Ten days after delivery Mrs. Henningsen was severely injured in an automobile accident due to defects in the new car. Plaintiffs, Mr. and Mrs. Henningsen, suing for consequential damages comprising loss of the car plus hospital and medical bills, named both the automobile dealer and the manufacturer as codefendants. The main issue in the case was whether or not the express warranty in the sales contract could eliminate all other warranties including an implied warranty of merchantability. The express warranty provided for repair and replacement of defective parts for ninety days or 4,000 miles, whichever came first and went on to state that "this warranty . . . [is] expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part. . . ."[13] The defendants argued that this clause precluded a suit for personal injury based on a warranty

7. *Id.* at 29.
8. 115 N.Y. 506, 22 N.E. 188 (1889).
9. 32 N.J. 358, 161 A.2d 69 (1960).
10. 115 N.Y. at 509, 22 N.E. at 189.
11. *Id.* at 511, 22 N.E. at 190.
12. *Id.* at 513, 22 N.E. at 190.
13. 32 N.J. at 367, 161 A.2d at 74.

theory since the express warranty allowed only repair of defective parts and disclaimed all other express or implied warranties. The court, in reaching its landmark decision for the plaintiffs, relied on principles of justice and public policy and noted that the warranty provision, drawn up by the Automobile Manufacturers Association, appeared in almost all new car sales contracts and eliminated the buyer's bargaining power. The court weighed the two competing principles of freedom of contract to disclaim liability versus disparity in bargaining positions in agreeing to the disclaimer and concluded that because the plaintiff had no negotiating strength, public policy and a sense of justice required the disclaimer to be held inoperative.[14]

The *Riggs* and *Henningsen* decisions support not only Dworkin's arguments but also the arguments of Hughes and Shuman. Although the import of the latter two writers' contentions against Hart's model of law is similar to Dworkin's, the thrust of their arguments vary.

Hughes is concerned with the fact that rules of law are often open to more than one interpretation. Judges then must look behind the law to the intent of the lawmaker in promulgating the rule. This investigation reveals that "[p]olicy is almost always to some extent articulated in law."[15] The court must then consider these policies and principles in reaching its decision as to what the rule of law is for the given facts. Hughes concludes that "[n]o precise distinctions can be made between rules [and] principles . . . but the terms serve to mark differences of degree in the precision of guides to decision-making."[16]

Whereas Hughes analyzes the problem a judge faces in applying a rule to a given case, Shuman argues that a model of law requires principles in addition to rules since *stare decisis* is really not the conclusion of law or holding but rather is the *ratio decidendi* of the court in reaching that holding. He notes that numerous cases cite principles in the *ratio* and thus principles must be included in the model of law.[17]

Accepting the validity of the proposition that principles are part of American law and its judicial decision-making process still leaves one with the problem of constructing a conceptual model for rules and principles which (a) most accurately accounts for the way courts, in fact, reach their decisions and (b) accounts for the

14. *Id.* at 388-91, 161 A.2d at 86-87.
15. Hughes, *supra* note 3, at 439.
16. *Id.* at 419.
17. Shuman, *supra* note 4.

relative place and importance of each variable in a jurisprudential model.

Throughout this article, it will be contended that a theory of law must include both principles and rules if the theory is to describe accurately the legal process in its day-to-day workings. This position is admittedly antithetical to most legal philosophers[18] who see rules and principles as mutually exclusive and unincorporable. Violation of the usual position is necessitated since a model of law should transcend philosophy and become a useful tool for all lawyers, judges and legislators in guiding their day-to-day legal decisions. It is to the task of building this model that this article now turns.

II. HART'S MODEL OF RULES

Since rules are basic to our system of law, it is reasonable to modify a pre-existing rule oriented theory rather than start anew. Hart presents the best conceptual analysis of rules[19] to date. His model, a reaction to Austin's[20] and other models of positivism, corrected the basic flaw that marred positivistic thinking. Namely, traditional positivism lacked any satisfactory structure to account for the variety of laws existing today or to predict what would classify as a law. It is this predictive aspect of a model that takes it from theory to pragmatic usefulness. Whereas Austin accounts for law with the over-simplistic postulation of a sovereign who is habitually obeyed,[21] Hart postulates a closed system of rules that will always predict what is or is not a rule of that legal system.[22]

Hart divides rules into two categories: primary and secondary. Primary rules are those rules that directly control and govern our behavior such as a rule against speeding. Secondary rules, on the other hand, are those rules which allow us to identify the primary ones and thus allow us to predict when an utterance is a rule of law. As Hart states:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or

18. *See, e.g.*, Dworkin articles, *supra* note 2.
19. HART, *supra* note 1.
20. J. AUSTIN, LECTURES ON THE PHILOSOPHY OF POSITIVE LAW (5th ed. 1885).
21. *Id.*
22. *See* HART, *supra* note 1, at 77-119.

modify old ones, or in various ways determine their incidence or control their operations.[23]

There are three types of secondary rules: rules of recognition, rules of change (public and private) and rules of adjudication.[24] The rule of recognition "will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[25] An example would be article I, section 8 of the United States Constitution conferring on Congress the power to control interstate commerce. Were it not for that provision, a secondary rule of recognition, any acts of Congress concerning commerce amongst the states would be invalid. Thus, describing a primary rule as valid, is to say that it has met all the tests of a rule of recognition.[26]

Rules of change authorize particular people or groups to enact new primary rules or eliminate old rules.[27] As Hart notes, "There will be a very close connection between the rules of change and the rules of recognition."[28] Rules of change allow modification of the otherwise static quality of primary rules that rules of recognition would create. For example, a rule of recognition authorizes Congress to enact laws regulating interstate commerce. But once Congress promulgates a law controlling a particular topic, can it change that rule as the years outdate it? A rule of change authorizes Congress to do so.

The last class of secondary rules, rules of adjudication, empower certain individuals such as judges to determine and resolve con-

23. *Id.* at 78-79. Hart contends it is meaningless to talk of the validity of the rule of recognition and that it can only be evaluated as theoretically appropriate for its particular use. *Id.* at 105-06. Hart's theoretical system assumes a hierarchy between the secondary rules and the primary rules of obligation with power to confer validity only being able to flow downward from the secondary to the primary rules. This conception is not necessary nor necessarily the most desirable. When the framers of the constitution met to draw up that most important document, that act being pre-legal, that is it occurred before the existence of our formalized legal system between the states, was neither valid nor invalid but only appropriate by consensual validation, accord by the people to follow its rulings. The document itself, however, may be placed within the closed system of rules and its separate rules validated by reference to the concept of the product resulting from the act. Hart notes that the rule of recognition is an ultimate rule with the constitutional rules being the supreme criterion of validity. *Id.* at 102-03.
24. *Id.* at 92-95.
25. *Id.* at 92.
26. *Id.* at 100.
27. *Id.* at 93.
28. *Id.*

flicts as to the rights and duties of individuals under rules, or to determine when a particular rule has been broken.[29] The statute conferring power on a particular court to hear probate matters and declare the law in these matters provides an obvious example of a rule of adjudication.

Hart feels (a feeling in which the present author concurs) that this model is a necessary and powerful antecedent to conceptualizing and understanding the way *in fact* the legal system works.[30] It presents a framework from which internally to analyze the legal system including such concepts as obligation, rights, duty, validity, source of law and authority.

That an internal perspective is essential has been overlooked not only by traditional positivists, but also by American realists. They have overemphasized what courts *in fact* do; this emphasis yields an accurate taxonomy of events but provides no conceptual understanding of the underlying legal process that would allow a predictive description of the source and use of law.

Hughes defines rules, for example, as "fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."[31] This definition does not tell what a rule is, how it can be identified, or when it is valid. It simply but inaccurately describes that when a person has a rule at his disposal, it will guide his behavior or judgment as to a particular fact situation with a fair degree of certainty.[32] This definition can only be an attempted summary of judicial opinions under rules. Jurisprudentially, it has not aided in identifying the appropriate standard[33] to be used or in explaining why a rule does not always act as the dispositive guide for a judicial decision. Furthermore, without postulating the secondary rules of adjudication, change and recognition, it is impossible to prescriptively explain the judicial decision-making process when no statutory rule or common law precedent is available to guide the judge.

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29. *Id.* at 94-95.
30. *Id.* at 76-79.
31. Hughes, *supra* note 3, at 419.
32. Hughes' definition is valuable for purposes of demonstrating that the legal system cannot be analyzed solely in terms of rules. Specifically, if a rule is only "fairly concrete," then conversely there must be instances where exactness of application is impossible. This opens the court to judicial discretion or judgment in interpretation and construction and often-times to balancing one rule against another or against another type of standard. All of which indicates that rules are not impregnable guides to outcome determination.
33. *E.g.*, rule, principle or policy.

With Hart's model, on the other hand, it can apriorily be determined when a rule is valid. The statute enacted by the state legislature would be valid because certain rules, the secondary rules, within the state and federal constitutions authorize the state legislature to enact primary rules on the statute's subject matter. These secondary rules also include limitations, for example due process,[34] so that if the statute speaks to a valid topic, but exceeds the limitation imposed within these secondary rules, the rule will be invalid and a court will hold it unconstitutional.

If the state legislature repeals a law and enacts a new one in its place, the same type of analysis is pertinent. However, the secondary rule of change is brought into play. The secondary rule of change also contains limitations or is limited by the rules of recognition. A state court could not repeal a federal statute or enact a contradictory state statute if the rule of recognition empowered only Congress to speak on that point. If, on the other hand, Congress had invaded a subject matter left to states by the appropriate rule of recognition, a court would hold the state statute valid and overrule the federal statute.

This discussion indicates the desirability of Hart's approach and its power as a theory, at least as applied to statutory law. Hart's model allows *post hoc* determination of any statutory rule's validity and apriorily determines the validity of a particular body enacting a new rule on a particular subject.[35]

When applying Hart's analysis to judge-made law, it is necessary to distinguish between the easy and hard cases. Hart's analysis applies with full power, for example, when the judge is confronted with an easy case where the facts clearly fit within the purview of only one rule. Thus, in a criminal case where the defendant is charged with assault[36] and the facts fall clearly within the scope of the assault statute, the judge only needs to decide if the statute is valid under its rule of recognition. With a hard case, however, where the facts do not come within the purview of any pre-existing rule, Hart's analysis loses its predictive accuracy;

34. The Due Process Clause is a secondary rule in that it limits the power of Congress to enact certain types of primary rules.
35. The analysis applies equally as well to rules of lesser import which are made by other legislative or administrative bodies. In working with the municipal building regulations, for example, Hart's analysis can explain and predict the validity of these rules in terms of the legal system. By looking to their source, the secondary rules upon which their validity rests, the relative import of these rules can be determined.
36. The criminal statute on assault which governs the behavior of the citizenry is a primary rule.

although it does maintain its descriptive power. It is impossible for the model to predict the outcome inasmuch as there is no primary rule to evaluate until the judge reaches his decision and states his holding. The model can account descriptively for this process by acknowledging that through the rules of adjudication and change, a judge has power to determine the law on the particular subject. Hart notes:

> No doubt the courts so frame their judgments as to give the impression that their decisions are the necessary consequence of predetermined rules whose meaning is fixed and clear. In very simple cases this may be so; but in the vast majority of cases that trouble the courts, neither statutes nor precedents in which the rules are allegedly contained allow of only one result . . . It is only the tradition that judges 'find' and do not 'make' law that conceals this. . . .[37]

Hart's model accounts for this process of "finding" the law through the concept of open-texturism which refers to two facts in the judicial decision-making process. The first and primary fact, according to Hart, is that for most rules there will be both clear and borderline fact situations. He states:

> All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness of 'open texture'. . . .[38]

The second reality is that there will be cases which do not fall within the purview of any rule.

> "The open texture of the law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in light of circumstances, between competing interests which vary in weight from case to case."[39]

The open-texturism of rules necessitates that any jurisprudential model, if it is to be accurate and answer Dworkin's arguments against rules,[40] include a conceptual analysis of what the law is and how judges "find it" or "make it" in these borderline or hard cases. Open-texturism creates the usage of principles in court decisions and necessitate their inclusion in a model of law. Unfortunately, Hart's model does not present a detailed analysis of open-texturism or rules accounting for it.

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37. HART, *supra* note 1, at 12.
38. *Id.* at 119-20.
39. *Id.* at 132.
40. *See* Dworkin articles, *supra* note 2.

III. ANALYSIS OF OPEN-TEXTURISM

The cause of open-texturism is explained by Hart in the following manner:

> It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminancy of aim.[41]

The two handicaps discussed by Hart, primarily manifest themselves in the following ways. Courts often face a problem in *interpreting* the words of a rule to ascertain its intended meaning. Interpretation is necessitated because of the semantic indeterminancy of language.[42] In addition, courts must *construe* the words of a rule to determine if the facts of the given case are within the purview of that rule. In construction, the court looks beyond the four corners of the instrument to determine the lawmakers' intention in promulgating the rule.[43]

The necessity of construing a rule mirrors the external variance caused by an infinite variety of possible fact situations. "[W]e are forced to recognize both clear standard cases and challengeable borderline cases."[44] With these two judicial problems in mind, it can be seen that there are various species of the genera, easy and hard cases. This continuum has never been delineated by prior writers but definitely exists.

A clear example of an easy case is one where the facts of the case clearly fit within the purview of only one rule. Conversely, a clear example of a hard case is one where the facts do not come within the purview of any rule. This type of case led Dworkin[45] to postulate the role of principles as law and to reject the rule-oriented model. Between these two extremes lies a continuum of examples which also define hard cases. These examples include: where only some of the facts are within the purview of the rule; where the facts clearly fit within the plain meaning of the rule but the outcome under that rule clashes with the statutory purpose, the underlying policy or the legislative intent; where the facts fit both the purview of a rule and a legal principle; where the facts do not clearly fit any rule but some of these facts (not necessarily

41. HART, *supra* note 1, at 125.
42. *See* A. CORBIN, CONTRACTS § 534 (one vol. ed. 1952).
43. *Id.*
44. HART, *supra* note 1, at 4.
45. *See* Dworkin articles, *supra* note 2.

the same ones) fall within the purview of two or more rules; and where "conflicting claims may be equally supported by the same legal standard."[46]

The existence of all these different types of hard cases suggests that rules are not equally powerful or work uniformly in all cases. As Shuman contends: "It is necessary to recognize that rules . . . function differently, both as to their appropriateness and as to their relative weight, in justifying judicial decisions."[47] This differential weighting of rules that occurs in judicial application is necessitated by three factors: the rule's pedigree, its internal structure and its appropriateness when applied to the external fact situation.

To speak of pedigree means to ask if the standard is valid according to the rule of recognition. If the standard is valid, it is a valid primary rule. But the pedigree goes beyond simply valid or invalid. Primary rules do have different import because of the particular secondary rule which authorized their promulgation. Thus, there is a hierarchy of rules. Examples of these different imports are distinctions of the federal versus state law, procedure versus substantive and constitutional versus statutory. Hart has explicitly recognized this point in his book. He notes that primary and secondary rules differ from each other and among themselves.[48] He states that "provision may be made for their possible conflict by their arrangement in an order of superiority, as shown by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law."[49] Within a given level on this ordering, there will be further ordering based upon inter-

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46. Shuman, *supra* note 4, at 723. Shuman offers this species as the hallmark of the hard case.
47. *Id.*
48. HART, *supra* note 1, at 91-94. Dowkin, on the other hand, takes a different position.

> Principles have a dimension that rules do not—the dimension of weight or importance. We can speak of rules as being functionally important or unimportant . . . In this sense, one legal rule may be more important than another because it has a greater or more role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supercedes the other by virtue of its greater weight.

Model of Rules, supra note 2, at 27.

Dworkin's position is open to criticism since it forces his distinction to theoretical meaninglessness. If courts in fact treat rules differentially, that is, as Dworkin would say they are functionally different, how can a theory that is supposed to describe the real world data treat rules as equivalent in importance?

49. HART, *supra* note 1, at 92-93.

nal structure and external appropriateness of the various rules. This hierarchy within secondary and primary rules provides a judge with one guide for choosing a particular rule over another.

Since rules vary in their import, it is surprising that such a clear division between rules and principles as non-rules developed in jurisprudence. Because of open-texturism, there is a hierarchy of rules and judges are forced to exercise their judgment in determining which rule applies. This exercise of judicial discretion requires that other standards be considered in "finding" the rule for the case at bar. To prove this assertion, one need only consider the meaning of *stare decisis*.

In decisional law, there is the familiar doctrine of *stare decisis*; but what exactly does this doctrine mean? Hart finds a simple answer for English law. "[T]he English system of precedent has . . . [produced], by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule."[50] Thus, one answer is that *stare decisis* refers to the rules of the prior cases. Shuman, on the other hand, takes a different approach:

> Giving respect to or standing by prior decisions as obligated by stare decisis does not tell the judge how to decide a future case. Rather it tells him and those who will assess his performance that whatever decision he reaches, he must account for all arguably relevant rules, principles, and policies announced in prior cases. . . . Thus, stare decisis does not require that later courts follow earlier ones in using the same rule, *ratio*, or ultimate conclusion in like cases, but only that the same standards be used, and that the same category of facts be considered in deciding whether a standard is met.[51]

While Hart considers a precedent to be a rule, Shuman considers precedent to be the obligation of the court to consider both the conclusion of law in respect to the given fact situation and the standards which justified that decision. These two positions are not antithetical. While Hart's analysis describes *stare decisis* for easy cases, Shuman's analysis accurately describes what occurs during those remaining hard cases.

Interestingly, Shuman's analysis more accurately reflects the use of precedent in American law. For example, to cite precedent is to assume and substantiate that the facts of the prior case and the present case are identical or at least similar in all operative aspects. Even where this is the case, courts in this country have consist-

50. *Id.* at 132.
51. Shuman, *supra* note 4, at 721-22.

ently looked beyond the conclusion at law of the prior case to the reasoning behind it inorder to assess the desirability and/or validity of the prior decision.

It is in the *ratio decidendi* that principles most often find their way into decisional law. If *stare decisis* includes the *ratio*, and it appears it must if open-texturism is ever to be explained adequately, those principles that appear in the *ratio* must be considered as law. To argue that they are not as important as other legal rules does not negate from the fact that they must also be considered rules since rules do differ in their import.

IV. PRINCIPLES AND JUDICIAL DECISION-MAKING

There are two types of principles that must be distinguished since only one of them may be placed within a legal model. The distinction drawn by this article between two classes of principles is not new, but traces its origin to Kant, who wrote:

> Practical principles are propositions which contain general determination of the will, having under it several practical rules. They are subjective, or *maxims*, when the condition is regarded by the subject as valid only for his own will, but are objective, or practical *laws*, when the condition is recognized as objective, that is valid, for the will of every rational being.[52]

The first type, the subjective, consists of those principles which are an individual's own guide and are not included in the legal model.[53] Included in this category would be one's moral, ethical or religious principles, such as: Do unto others as you would have them do unto you. There is nothing legal in this category inasmuch as the imposition of the principle as a guide to one's behavior comes from the individual or some group he belongs to or believes in and *not* from the lawmakers (legislators) or legal determiners (courts) as sanctioned by the secondary rules.

Unfortunately, it is from this class of principles that the natural law philosophers drew the standards which they tried to elevate to the status of law and rules of law. Hart notes:

> [T]he Thomist tradition of Natural Law . . . comprises a twofold contention: first that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly that man-made laws which conflict with these principles are not valid law.[54]

52. Kant, *Critique of Practical Reason*, as cited by PERELMAN, JUSTICE 726 (1967).
53. It might be argued that some of these should be included but personal opinion is not at issue here.
54. HART, *supra* note 1, at 152.

Under the scrutiny of a positivistic approach, the attempt of natural lawyers was futile. The natural law model is inadequate because it provides no internal criteria comparable to Hart's secondary rules to determine what is a valid legal rule. Today the use of the term "principles" still is associated with this subjective form of standard thereby obscuring the objective principles.[55]

Kant referred to the second class of principles as objective and law because this class contains valid guides for human behavior.[56] In terms of the rule-oriented model, these principles are valid principles of law (technically they may be called valid primary rules of law) because they conform to the secondary rules.[57] Consider the statutory rule "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."[58] Legislative enactment, pursuant to the rule of recognition, clearly classifies this principle of good faith as a primary rule.[59]

Judicial decision-making illustrates the same process. In arriving at a new precedent, judges often cite these objective principles as justifying their decisions. In certain cases, these principles are the holding's sole justification and actually become the conclusion of law. A case in point is the Supreme Court's opinion in *Mercoid Corp. v. Mid-Continent Investment Co.*,[60] where the principle that equity will not aid a person who comes to court with unclean hands became the rule of misuse of patent rights.

Hart acknowledges that this process exists when he states:

> The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values. . . .[61]

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55. Hart is guilty of this association. *Id.* at 151-80. He never considers the possibility that principles could be other than moral.
56. Since Kant was postulating acceptance and reason as the determiners of validity, he is considered here by analogy only.
57. The possibility that a legal principle may be a secondary rule is not considered since the author of this article's analysis to date only supports the conclusion that it is a primary one.
58. UNIFORM COMMERCIAL CODE § 1-203.
59. It might be argued that principles are vaguer than rules and thus the principle should not be classified as the rule. This argument is fallacious for two reasons. First, what determines whether a given standard is a valid primary rule is its authority under a secondary rule and not its scope of applicability. Second, the open-textureness of a rule encompasses the form of a principle.
60. 320 U.S. 661 (1944).
61. HART, *supra* note 1, at 199. Conceptually, Hart's analysis of principles would be more consistent if he had distinguished between the

He does not state, however, how these principles which are judicially enunciated become valid laws, although his secondary rules of adjudication and change easily encompass them.[62] By these secondary rules, the principle enunciated in the court's conclusion of law is a decisional rule of law and valid within the model's criteria.

This paper has considered two classes of principles: the subjective, non-legal principles of morality and religion, and the objective, legal principles which are definitely rules of law within the positivistic model because they appear in statutory or decisional form. There is a third class of principles which must be dealt with, however, and this class poses the more difficult problems.

This third class is composed of those principles which courts discuss in their opinions, but which were (a) not applied in forming the courts' holdings or conclusions of law or (b) were applied but do not appear obvious in a reading of the conclusions of law alone. These principles fall some place between the two extreme points since they are objective in terms of a court judicially declaring that they must be considered in arriving at an opinion. If *stare decisis* is considered to include the *ratio decidendi* which justifies the conclusion of law, it is logical to argue that the intermediate principle which justified the conclusion, but does not appear obvious in it, is a rule of law albeit the weakest one in its import.

Those principles, on the other hand, which have not been cited by a court cannot be considered law. As Perelman notes, "For all societies and all intellects, there exist certain values and beliefs that at a given moment are approved without reservation and accepted without argument; hence, there is no need to justify them."[63] This is not the case here and it thus remains for the proponent to convince the court at another time.

V. CONCLUSION

The purpose of this article was to argue that an adequate theory of law must include both principles and rules. Past writings

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moral-subjective principles and the legal-objective principles. His statement indicates that he is allowing for the latter although he doesn't explicitly label them as such.

62. It is ironic Dworkin concluded that Hart's theory could not account for these objective principles. Dworkin's selectively emphasizing Hart's use of moral principles while overlooking the legal ones combined with his over-emphasis on the rule of recognition to the exclusion of the other secondary rules could account for his conclusions.

63. PERLMAN, JUSTICE 64 (1967).

have demonstrated that both types of standards are indeed operative in the legal process. Yet these same writings have either ignored the task of suggesting an adequate model of law or have adhered to the notion that principles and rules could not be combined in one model. This later point of view is based on theoretical assumptions and niceties that must be ignored if legal philosophy is to serve a utilitarian function to the everyday practice of law.

Because rules are the basic fabric of our law and Hart has presented the best model of rules to date, his model has been presented as the framework for including principles. An analysis of Hart's concept of law demonstrated its predictive and descriptive adequacy in accounting for statutory law and easy cases in decisional law, but showed its inadequacy for predicting and explaining the remaining hard cases that judges must decide. Hart simply but inadequately dealt with this area by labeling it open-texturism. Because of this void in Hart's model, this article undertook to analyze what open-texturism comprises and how it effects a model of law. This analysis revealed that rules are not uniform in weight or applicability, but exist in a hierarchy and this in turn suggested that judges must turn to other standards in order to "find" the law. An analysis of *stare decisis* supported the notion that rules are hierarchial and revealed that judges often cite principles in deciding their conclusion of law. Accepting Shuman's notion that *stare decisis* includes both the *ratio decidendi* and the ultimate conclusion of law, it was concluded that principles cited in the *ratio* or in the holding can indeed qualify as rules of law.

An analysis of principles demonstrated that legal, objective principles such as those which appear in the court's opinion or the holding must be separated from non-legal, subjective principles which are individually held and believed. It is the confusion between these two types of principles that has hindered recognition that some principles must be classified as law. Since Hart's secondary rules easily encompass these legal principles, they can be classified as rules and fit within a positivistic model of the law.

To deny that principles can and do operate as rules of law in many cases is first to force the postulation of an inaccurate and inadequate theory of law, and second to force judges to hide the fact that their decision was guided by a valid legal principle. As Llewellyn has noted, "The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools."[64]

64. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1937).